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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JAY ANTHONY STROBEL,

Defendant and Appellant.

C085972

(Super. Ct. No. 15F06849)

Following a jury trial, defendant Jay Anthony Strobel was found guilty of two counts of assault with a semiautomatic firearm and one count of criminal threats. The jury also found defendant personally used a firearm within the meaning of Penal Code¹ section 12022.5, subdivisions (a) and (d) as to all counts.

¹ Further section references are to the Penal Code unless otherwise indicated.

Sentenced to an aggregate term of 22 years 4 months, defendant appeals. He contends: (1) the trial court abused its discretion when it based upper term sentences on improper aggravating factors; (2) the abstract of judgment improperly provides he was ordered to pay mandatory court operations and court facilities fees that were never orally imposed, and it would be error to impose them now because the trial court never inquired about defendant's ability to pay in violation of the United States and California Constitutions; and (3) the matter should be remanded for the trial court to exercise its discretion whether to strike the firearm enhancement imposed under section 12022.5. We affirm the upper terms imposed, but remand for the court to determine whether defendant has the ability to pay mandatory court operations and facilities fees. While on remand, the court shall also exercise its discretion on whether to strike the gun enhancements.

FACTUAL AND PROCEDURAL BACKGROUND

I

Crimes

In September 2015, Tiffany ended her romantic relationship with defendant. Defendant contacted Tiffany frequently and told her he was angry and sad, and wanted to get back together. Tiffany did not wish to continue the relationship, however, and shortly after the break up she began dating William. A few weeks after the break up, defendant took Tiffany's phone because it belonged to him. In hopes of finding out where Tiffany was living, he looked through the phone, found a recently contacted number, and did a "reverse phone finder" search which generated William's address. He visited William's home once to drive by and observe and another time to pick up his dog from Tiffany.

On November 6, 2015, Tiffany and William went to a party, returned to William's house around midnight, and went inside without locking the doors. While watching YouTube videos on the living room couch, they saw a reflection in the sliding glass door of a person crawling through the front door. Thinking it was his roommate, William

playfully said, “ ‘We see you, fucker.’ ” As the person came around the corner, Tiffany realized it was defendant and he had a gun in his hand.

Tiffany and William jumped from the couch with their hands up as defendant pointed the gun at their heads from two feet away. Defendant repeatedly yelled, “ ‘Fuck you, Tiffany,’ ” “ ‘You should have talked to me,’ ” and “ ‘You’re going to die tonight.’ ” When Tiffany pled for defendant to stop, he responded, “ ‘Shut up. Shut up, bitch. Fuck you.’ ” Defendant continued to point the gun at Tiffany and William and sometimes defendant lunged toward them as he yelled.

When William tried to calm defendant down and tell him to stop, defendant responded, “ ‘You need to leave because she’s going to die tonight.’ ” William refused, and defendant continued to point his gun at them, while saying all three of them were going to die. The group moved to the kitchen, where William stood in front of Tiffany to block her from defendant. Defendant tried reaching his gun around William to Tiffany, but William pushed the gun and defendant’s hand away, causing both men to fall to the floor. Then, defendant hit William across the bridge of his nose and eyebrow with the gun, blurring William’s vision, and proceeded to kick William in the chest three or four times, sending William into the garage. Defendant then attacked Tiffany, also kicking her into the garage and onto the floor.

Still pointing the gun at the two, defendant followed them into the garage and exclaimed, “ ‘Do you think I’m a coward? ‘Cause I’m not a coward, I’m going to do this.’ ” Tiffany and William ran out of the garage and to the side of the house before moving toward the front yard. Tiffany hid behind a car while William and defendant stood in the front yard. William had his back to the garage and defendant had his back to the street, pointing his gun at William. Fearing defendant would shoot William, Tiffany walked in front of the garage door so defendant would see her, and covered her eyes. Defendant fired the gun and Tiffany fell over while William remained standing, although

neither was hit. The fired bullet went into the garage, ten feet from where Tiffany was standing.

While walking away, defendant said, “ ‘You’re lucky that [William’s] such a nice guy.’ ” Once defendant was out of sight, Tiffany and William ran inside the house, locked the doors, and called 911. The entire incident lasted eight to 10 minutes.

II

Sentencing

The trial court sentenced defendant to 22 years four months in prison. It imposed the upper term of nine years for the assault with a firearm conviction against Tiffany, plus a consecutive upper term of 10 years for the firearm enhancement. It also imposed a consecutive three years four months for the assault with a firearm conviction against William. The court based its decision to impose upper terms for the assault against Tiffany and the attached firearm enhancement on two aggravating factors -- the crime involved great violence and the manner in which the crime was carried out indicated planning.

While not imposed orally during sentencing, the abstract of judgment and minute order indicate a \$120 court operations assessment and a \$90 court facilities assessment. Although the probation report recommended the court impose jail booking and classification fees, as well as the costs of the investigation and presentence report, the court declined to do so. It further reduced the recommended restitution fine under section 1202.4, subdivision (b) from \$5,200 to \$1,000. At no time did defendant object.

DISCUSSION

I

The Trial Court Did Not Abuse Its Discretion When Sentencing Defendant

Defendant contends the trial court abused its discretion by imposing upper terms on the assault with a firearm conviction against Tiffany and the attached firearm enhancement. Specifically, defendant argues: (1) the crime did not involve greater than

usual violence or threat of great bodily harm in excess of what is inherent in the crime itself; and (2) the crime was not carried out with planning and sophistication. We disagree.

A trial court's decision to impose the upper term is subject to review for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) A trial court abuses its discretion if it "relies upon circumstances . . . not relevant to the decision or that otherwise constitute an improper basis for [its] decision." (*Ibid.*) In exercising its discretion to impose a sentencing judgment, the court may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. (Cal. Rules of Court, rule 4.420(b).) Even one aggravating factor is enough to justify imposition of an upper term, and a court may minimize or even completely disregard mitigating factors without stating its reasons. (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1258.)

Defendant argues the court improperly relied on California Rules of Court, rule 4.421(a)(1) -- the crime involved great violence or threat of great bodily harm -- to aggravate his sentence. Specifically, he contends the crime of assault with a firearm necessarily involves violence and the threat of great bodily harm, and his use of a gun to fire a single shot at a garage door near Tiffany did not exceed the minimum necessary to establish the elements of the crime and associated enhancement, or make his crime distinctively worse.

A sentencing court may not use a reason to impose a greater term if the reason also is either: (1) the same as an imposed enhancement; or (2) an element of the crime. (Cal. Rules of Court, rule 4.420(d); *People v. Clark* (1992) 12 Cal.App.4th 663, 666.) Where the facts surrounding the charged offense, however, make the offense distinctively worse than the ordinary, the trial court can use such evidence to aggravate the sentence. (*People v. Black* (2007) 41 Cal.4th 799, 817; *People v. Morena* (1982) 128 Cal.App.3d 103, 110.) A crime is outside of the ordinary when the facts exceed the minimum

necessary to establish the elements of the crime. (*People v. Castorama* (1996) 51 Cal.App.4th 558, 562.)

Citing *Young*, defendant argues the court relied on dual facts to find the crime involved great violence or a threat of great bodily harm. The defendant in *Young*, of whom police were in hot pursuit, used a firearm to shoot twice into the ground and at least three more times directly at an officer. (*People v. Young* (1983) 146 Cal.App.3d 729, 732-733.) He was convicted of assault with a deadly weapon and a firearm enhancement. (*Id.* at p. 731.) The sentencing court relied on the defendant's firing of the gun when finding the aggravated term appropriate on the assault conviction. (*Id.* at p. 732.) When remanding, the *Young* court found the aggravated term could not be justified by the fact defendant fired his weapon because that fact already justified the imposition of the firearm enhancement. (*Young*, at p. 734.)

Defendant argues his case is like *Young* because the aggravating factor of "threat of great bodily harm," as well as the firearm enhancement, both depended upon his firing of a gun. The facts here are distinguishable from *Young* because the trial court imposed the aggravating terms based on more than defendant's firing of the gun. The court defended its imposition of the upper terms by expressing there were "multiple acts that took place in the eight minute period of time that would have constituted distinct acts of violence," and "defendant's conduct involved not only the infliction of injury, but also involved an extended period, albeit maybe eight minutes, but an extended period of terror which will live on with the victims for an extended period for time."

The record supports this finding. For close to 10 minutes, defendant was in William's home, holding Tiffany and William hostage, yelling at them, threatening to harm and kill them, and lunging toward them with the gun. Defendant kicked both Tiffany and William and struck William in the face with a gun, blurring his vision.

We agree the firing of a gun should not be used as the sole basis to impose an aggravating factor as well as an enhancement. Here, however, defendant's acts exceeded

the minimum requirements of an assault with a firearm with an attached firearm enhancement, making his crime distinctively worse than the ordinary. Accordingly, defendant's argument is unpersuasive.

Next, defendant argues the trial court erred by relying on the "planning, sophistication, and professionalism" of defendant's crimes as an aggravating circumstance (Cal. Rules of Court, rule 4.421(a)(1)) because the manner in which the crime was carried out constituted an "impulsive plan born of intoxication, depression, and despair." We disagree.

Defendant went out of his way to locate Tiffany, including doing a reverse phone number lookup. He visited William's home twice before the incident, and on the day of the incident, he drove to William's home, snuck in quietly and consciously seeking to avoid detection, before holding Tiffany and William at gunpoint for a significant period of time. These facts do not signal an impulsive plan born of intoxication, depression, and despair. Instead, they show thoughtfulness, and a level of planning during which defendant had ample opportunity to reflect upon his next move. Consequently, we cannot say the trial court abused its discretion by finding the existence of this aggravating factor.

The trial court's reliance on the two aggravating factors to impose maximum terms was not an abuse of discretion and did not constitute an improper dual use of facts.

II

Remand Is Necessary For The Trial Court To Impose Mandatory

Fees And Determine Whether To Strike The Gun Enhancement

In supplemental briefing, defendant contends we must strike the court operations and court facilities fees appearing in the minute order and abstract of judgment because the trial court never orally imposed those fees. The People counter that we may impose those fees on appeal because they are mandatory. (See § 1465.8; Gov. Code, § 70373.) Defendant disagrees in light of a new case holding it violated due process under both the

United States and California Constitutions to impose these fees without first determining the convicted defendant's ability to pay. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1168.) We agree with defendant.

It is undisputed the trial court did not orally impose the court operations and court facilities fees, and that the statutes describing such fees require their imposition. It is further undisputed that *Dueñas* held it violated the United States and California Constitutions to impose these fees without first determining a defendant's ability to pay them. (*People v. Dueñas, supra*, 30 Cal.App.5th at p. 1168.) The People, however, contend imposing these fees on appeal does not run afoul of *Dueñas* because defendant did not object at sentencing arguing an inability to pay nor does the record demonstrate he has an inability to pay. We do not find this argument persuasive.

Because the trial court never imposed the court operations and court facilities fees, defendant was never afforded the opportunity to object to their imposition. Further, because the trial court reduced the restitution fine from that recommended by probation and struck other fees, it is not clear whether the court believed defendant had the ability to pay or would have imposed the court operations and court facilities fees if defendant had the opportunity to make an objection. Also, we agree with *Castellano* in that, "defendant's challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial," and we decline to find forfeiture. (*People v. Castellano* (2019) 33 Cal.App.5th 485, 489; see contra, *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [defendant forfeited challenge by not objecting to the assessments and restitution fine at sentencing]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155 [same].) For these reasons, we conclude it appropriate to remand the case to the trial court for it to impose the court operations and court facilities fees and provide defendant with an opportunity to object to their imposition and request a hearing regarding his ability to pay, if applicable.

While on remand, the trial court shall also exercise its authority consistent with the amendment to section 12022.5, subdivision (c), which allows the sentencing court to exercise discretion to defendant's gun enhancements.

DISPOSITION

The matter is remanded for the trial court to: (1) impose the court operations fee (§ 1465.8) and court facilities fee (Gov. Code, § 70373), giving defendant an opportunity to request a hearing on his ability to pay these fees; and (2) exercise its newly granted discretion under section 12022.5, subdivision (c).

/s/
Robie, Acting P. J.

We concur:

/s/
Duarte, J.

/s/
Hoch, J.